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# The Constitutional Court in the 2016 Constitutional Draft: A Substitute King for Thailand in the Post-Bhumibol era?

## Part 1: Crisis Powers

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On 29 January 2016, the Constitution-drafting committee presided by Meechai Reechupan issued the official draft of a new constitution. This draft is the third since the 2014 coup took place on 22 May 2014. The most controversial issue in the first and second drafts was the creation of unelected organs given special powers allowing them to take over the administration or impose legislation under specific circumstances, such as in times of crisis<sup>512</sup>. The 2016 draft grants crisis powers to the Constitutional Court<sup>513</sup>. This is not surprising : since its creation, the Constitutional Court has increasingly intervened in the political sphere in times of crisis, thereby expanding its power gradually, a process referred to by many scholars and commentators alike as "judicialization of politics"<sup>514</sup>.

The latest constitution-drafting process results in a further expansion of the Court's scope of jurisdiction. According to the 2016 draft, the Court has now the power to examine cases based on petitions filed directly by individuals, without the requirement that an actual dispute be brought to the court by political organs or

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<sup>512</sup> In the first 2015 draft, the National Reform Strategy Committee was empowered to solve crisis (art. 279). In the second 2015 draft, the National Committee on Reform and Reconciliation had extensive powers to take over in case of crisis (art. 260).

<sup>513</sup> See Constitution-drafting committee, ສູນປະລັກຄາງສາທິ່ງ ວົງວົງສູນປະລັກຄາງນູ່ອົງດັນ [Summary of core principles, First Constitutional Draft], January 2016, p. 20.

<sup>514</sup> See Bjoern Dressel, "Judicialization of Politics or Politicization of the Judiciary? Considerations from Recent Events in Thailand, *The Pacific Review*, 2010, vol. 23, n.5, pp.671-691; Eugenie Merieau, "The Deep State and Judicialization of Politics in Thailand", *Journal of Contemporary Asia*, forthcoming, Teerayuth Boonmee, ຖະການຈິງວັດທະນາ [Judicialization], Bangkok: Winnyuchon, 2006.

other courts (article 46). It can also interpret cases based not on the Constitution *per se* but on "constitutional practice in the democratic regime of government with the King as Head of State<sup>515</sup>" (article 207), whose definition remains widely disputed. The two constraints that usually limit the power of constitutional courts, namely the need for a dispute to actually be brought to court and the requirement to adjudicate cases based on the constitution, are effectively removed. The 2016 draft attempts to eliminate boundaries to the Constitutional Court's increasing involvement in the political sphere.

Such involvement can be traced back to 2006. In 2006, in the midst of the political crisis following the April 2 elections boycotted by the opposition, demonstrators called for the King to intervene and remove then Prime Minister Thaksin Shinawatra based on "constitutional practice in the democratic regime of government with the King as Head of State" (article 7). In his April 25 speech, he refused to do so, but asked the courts - which had a constant history of judicial restraint until 2006 - to solve the crisis on his behalf instead<sup>516</sup>. A few days later, the Constitutional Court ruled the April 2 election unconstitutional, paving the way for the 2006 coup. In 2014, no King's speech asked the courts to act in a particular manner; however, the Constitutional court cancelled the February 14 election, and dismissed Yingluck Shinawatra, creating favourable conditions for the 2014 coup to succeed. This would suggest that the deferential-turned-activist Constitutional Court had "emancipated" itself from the King's guidance.

This article argues that the transfer of royal prerogatives to the Constitutional Court had been engineered - more or less consciously - since the end of the 1990s, at a time when elites started to think about royal succession: the Constitutional Court was progressively endowed with traditional royal prerogatives including extraordinary powers in times of crisis, a transfer of powers that could prove useful in the post-Bhumibol era. Actually, from its creation in 1997 to its reforms in the 2007, 2015 and 2016 constitutional texts, the Constitutional Court was envisioned as an

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<sup>515</sup> In Thai, ประเพณีการปกครองในระบอบประชาธิปไตยอันมีพระมหากษัตริย์ทรงเป็นประมุข. The translation used is the one used by the Secretariat of the House of Representatives in translating the 1997 and 2007 Constitutions. It could also be translated as "constitutional customary law" although such translation would not convey Thai particularism in this matter.

<sup>516</sup> For a full English translation of the speech, see *The Nation*, "HM the King's April 26 speeches (unofficial translation)", 27 April 2006, [http://www.nationmultimedia.com/2006/04/27/headlines/headlines\\_30002592.php](http://www.nationmultimedia.com/2006/04/27/headlines/headlines_30002592.php) (accessed 30 December 2015).

instrument of protection of elites' interests challenged by the prospects of both democratization and royal succession<sup>517</sup>. In this article, I will look at failed endeavours by constitution-drafters to transfer royal powers onto the Constitutional Court in 1997, 2007, and 2015, before turning to the 2016 draft.

### **1/ The 1997 Constitution: an attempted transfer through article 7**

Article 7 of the 1997 Constitution, dealing with "constitutional practice in the democratic regime of government with the King as Head of State" in case of crisis, read as follows in its 1997 final version:

Whenever no provision under this Constitution is applicable to any case, it shall be decided in accordance with the constitutional practice in the democratic regime of government with the King as Head of the State.

This article had been used in many constitutions before, especially, as it proved most useful, in short interim texts<sup>518</sup>. However, article 7 does not define whose responsibility it is to define and interpret what constitutes "constitutional practice in the democratic regime of government with the King as Head of State". This is the reason why in 2006, civil society actors, including academics, lawyers, and politicians, could engage in a vivid discussion about what article 7 actually meant and whether or not it was providing the legal basis for allowing the King to directly intervene in politics. Based on the King's practice to appoint

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<sup>517</sup> On how the Constitutional Court is a tool of the elites to maintain their grab on power when faced with democratization, see Tom Ginsburg, *Judicial Review in New Democracies, Constitutional Courts in Asian cases*, Cambridge : Cambridge University Press, 2003 and Ran Hirschl, *Towards Juristocracy : The origins and consequences of new constitutionalism*, Cambridge : Harvard University Press, 2007.

<sup>518</sup> Article 7 has a long history. It was first added to the Thai constitution in 1959 after Sarit Thanarat's coup d'état to allow authorities a level of discretionary power over how to interpret what was at the time a short constitution. Thereafter it became a traditional feature of post-coup Constitutions. In the 1972, 1976, 1977 and 1991 (1) Constitutions, it only referred to "the constitutional practice in the democratic regime of government" but starting with the 1997 Constitution onwards, the expression "with the King as Head of State" was added. From this point, customary constitutional practice became entrenched with a royalist reading of the country's history- a history that places the monarchy as the main agent of Thai democratization and the savior of the nation whenever political crises threaten its survival. See Eugenie Merieau, 'Thai juristocracy', *New Mandala*, May 2014

replacement prime ministers in times of crisis<sup>519</sup>, protesters invoked article 7 to call for a royally-appointed Prime Minister to replace Thaksin. The King publicly refused, saying article 7 did not allow him to appoint a new PM. In this case, the King acted as the final interpreter of what constituted "constitutional practice in the democratic government with the King as Head of State".

However, the power to interpret "constitutional practice in the democratic government with the King as Head of State" was initially, in the 1997 Constitution, given not to the King, but to the Constitutional Court. In the first draft of the 1997 Constitution, article 7 was actually article 264. It was part of the title on the Constitutional Court, which dealt with powers of constitutional review. Article 264 read: Whenever there is no provision under this Constitution giving competence to a specific organ to issue an opinion or a ruling, constitutional practice in the democratic regime with the King as Head of State should be applied, and the Constitutional Court shall be the organ in charge of issuing such opinion or ruling.<sup>520</sup> This paragraph was opposed by CDC members as being too restrictive - they feared that some cases would never be reaching the court.<sup>521</sup> It was decided to drop the reference to the Constitutional Court and move the provision to the title on general dispositions between article 6 on the Constitution as supreme law of the country and article 7 on the inviolability of the King<sup>522</sup>. It became article 7 of the revised 1997 constitutional draft. Its genesis in relation to the Constitutional Court was never discussed again.

## **2/ The 2007 Constitution: an attempted transfer through article 68**

Under the 2007 Constitution, article 68 deals with "the right to protect the Constitution". It reads:

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<sup>519</sup> In 1992, popular protests called for the end of military rule. The King summoned protest leader Chamlong Srimuang and Prime Minister Suchinda Kraprayoon. Following the intervention, Chamlong told the protesters to disperse and Suchinda resigned as Prime Minister. The civilian Anand Panyarachun became Prime Minister.

<sup>520</sup> มาตรา 264 ในกรณีที่เรื่องใดในมิหนอยู่ด้วยในรัฐธรรมนูญนี้ว่า เป็นอำนาจขององค์กรใดเป็นผู้ให้ความเห็น หรือพิจารณา วินิจฉัยให้ปฏิบัติตามประเพณีการปกครองในระบอบประชาธิปไตย อันมีพระมหากษัตริย์ทรงเป็นประมุข โดยให้ศาลรัฐธรรมนูญเป็นผู้ให้ความเห็น หรือพิจารณาในจังหวะ - Meeting of the Constitution-drafting committee, 24 June 1997, [http://library2.parliament.go.th/giventake/content\\_cons40-50/cons2540/pi400624.pdf](http://library2.parliament.go.th/giventake/content_cons40-50/cons2540/pi400624.pdf) (accessed 7 December 2015)

<sup>521</sup> *ibid*. It must be noted that Bowornsak Uwanno also opposed the draft article. He considered that the wording gave too much power to the Constitutional Court.

<sup>522</sup> *ibid*. See also Dr. Montri Rupsuwan, เศษสารนั้นของรัฐธรรมนูญ, Bangkok : Winyuchon, 1999, p.68-69

Article 68. No person shall exercise the rights and liberties prescribed in the Constitution to overthrow the democratic regime of government with the King as head of State under this Constitution or to acquire the power to rule the country by any means which is not in accordance with the modes provided in this Constitution. In the case where a person or a political party has committed the act under paragraph one, the person knowing of such act shall have the right to request the Prosecutor General to investigate its facts and submit a motion to the Constitutional Court for ordering cessation of such act without, however, prejudice to the institution of a criminal action against such person.

In late 2013, in the midst of a crisis, the article was used by the Constitutional Court to intervene in the political process and rule against constitutional revision<sup>523</sup>. According to early drafts of article 68, the Constitutional Court was given even more crisis powers. In the first set of proposals submitted by the CDC to the Constitution-Drafting Assembly, presidents of the three courts were to meet and appoint a caretaker government in case there was a vacancy of the office of prime minister. In March 2007, early drafts of article 68 fourth paragraph provided that:

The Constitutional Court President, the President of the Supreme Court and the Supreme Administrative Court choose an interim cabinet, which should be comprised of people with experience in administration.<sup>524</sup>

This proposal was later "softened", from giving court presidents the authority to select a prime minister to giving them the mandate to

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<sup>523</sup> In June 2012, the Constitutional Court accepted petitions contesting the legality of an attempt at constitutional revision launched by the government, on the legal basis of article 68 of the Constitution. The petitions were filed directly with the Court. However, the Constitution did not provide for this *modus operandi* : complaints were to be filtered by the Prosecutor General. Both article 63 of the 1997 Constitution and article 68 of the 2007 Constitution did not allow complaints to be filed directly with the Court. This was made very clear by Bowornsak Uwanno during the discussions on article 63 (article 68 of 2007 Constitution) during the constitution-drafting process in 1997. However, the Court accepted the case and in an *obiter dictum*, it recommended that the parliament amend the Constitution article by article or consider organizing a referendum. The government bowed to the Court and proceeded with amendment-by-amendment revision. On November 20, 2013, the Court ruled that amending article 113 to make the Senate a-fully-elected house was an attempt to overthrow democracy with the King as Head of State. This latest ruling prevented all future amendments to be made to the 2007 "judges'charter". In this ruling, the Constitutional Court quoted the danger of "parliamentary dictatorship" if the Senate was not to be half-appointed.

<sup>524</sup> *Ibid.*

"meet" to "consider ways to solve the problem". By the end of March 2007, political representatives were added to the draft and it became:

If there is a national crisis or a political situation where it is necessary, there shall be a meeting of the following, the PM, President of House of Representatives, President of the Senate, Leader of the Opposition, President of the Constitution Court, President of the Supreme Court, President of the Supreme Administrative Court, and President(s) of Independent Agencies under the Constitution, to consider ways to solve the problem.

This paragraph was finally removed due to popular pressure, although a majority of CDC members seemed to favour it<sup>525</sup>. The attempt to give judges a constitutional mandate to act as "actors of crisis resolution" failed.

### **3/ The 2015 Constitutional drafts: attempted transfers through a merging of discarded articles 7 (1997 draft) and 68 (2007 draft) into article 7**

In the April 2015 draft, similar attempts were made. Discarded article 68 (2007 draft) was merged into discarded article 7 (1997 draft) as follows:

Article 7. Whenever no provision under this Constitution is applicable to any case, it shall be decided in accordance with the constitutional convention in the democratic regime of government with the King as Head of State.

In the case where the question concerning any act or decision under paragraph one arises in the affairs of the House of Representatives, the Senate, the National Assembly, the Council of Ministers, the Supreme Court, the Supreme Administrative Court or any Constitutional organization, it may request the Constitutional Court to make decision thereon, but the request of the Supreme Court and the Supreme Administrative Court shall be approved by the plenary session of the Supreme Court or the Supreme Administrative Court and on the matter related to the trial and adjudication of the case.

Thus, whenever there is a crisis, the Constitutional Court was entitled to "make a decision thereon". The following draft, finalized and dismissed in September 2015, gave powers to solve

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<sup>525</sup> Some of the CDC members even proposed to add the three military chiefs to the crisis committee, notably Sewot Thinkul. See CDC minutes, 18 June 2007.

crisis to "a strategic committee" predominantly composed of members of the judiciary and the army<sup>526</sup>.

#### **4/ The 2016 draft: a successful transfer demonstrated by the suppression of article 7 ?**

In the 2016 draft, the Constitutional Court is yielding even more power. In 2015, it was announced that the Constitutional Court would have power to "advise" any agency on any matter, even though there was no formal dispute arising and reaching the court<sup>527</sup>. However, in the final draft, the Constitutional Court still does not have a real power of self-referral. However, through the use of revised article 68, it can be sure to choose its cases from individual petitions. The revised article 68 (article 46) allows individuals to file complaints directly with the Constitutional Court without actual screening by the Prosecutor General or the Ombudsman<sup>528</sup>.

Article 46. No person shall exercise the rights and liberties prescribed in the Constitution to overthrow the democratic regime of government with the King as Head of the State.

In the case where a person or a political party has committed the act under paragraph one, the person knowing of such act shall have the right to request the Prosecutor General to investigate its facts

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<sup>526</sup> Article 260 of the September 2015 draft provided for a 23-member National Committee on Reform and Reconciliation Strategy, which would have included the Prime Minister, the supreme commander of the military, the chiefs of the three armed forces and the police chief, together with former premiers and former Senate, House of Representatives and Supreme Court presidents. For an account in English, see *The Nation*, "The draft charter's democratic deficit", 25 August 2015, <http://www.nationmultimedia.com/opinion/The-draft-charters-democratic-deficit-30267328.html> (accessed 7 December 2015)

<sup>527</sup> *Matichon*, กระบวนการค่าครรภ์. เพิ่มอีก ปัจจัดแข็งที่รัฐไม่เกิด ให้ค่าแนะนำ [Constitution-Drafting Committee announces modes of recruitment of Constitutional Court justices, increases their power, to allow them to judge on conflicts that haven't arisen yet, that they give recommendations], 25 November 2015, [http://www.matichon.co.th/news\\_detail.php?newsid=1448447251](http://www.matichon.co.th/news_detail.php?newsid=1448447251)

<sup>528</sup> This revision was made in the 2015 constitutional drafts. It constitutionalized *a posteriori* a wrongful application of article 68 (2007 Constitution) in 2012/2013. See note 11. In the April 2015 draft, article 31 reads : "In the case where a person or group of person has committed the act under paragraph one, the person detecting such act shall have the right to request the Constitutional Court for ordering cessation of such act or any other appropriate order without prejudice to the institution of a criminal action against whom doing such act." In the September 2015 draft, article 34 reads the same and adds that acts of parliament or other institutions that act according to the constitution cannot be considered to be an attempt to overthrow the "democratic regime with the King as Head of State".

and submit a motion to the Constitutional Court for ordering cessation of such act.

In the case the Prosecutor General decides to reject the complaint or does not forward the motion to the Constitutional Court within 30 days, the individual can submit a motion directly to the Constitutional Court.

The action under paragraph 2 does not prejudice to the institution of a criminal action against such person.

Also, in deciding upon a case, including conflicts between constitutional organs, the Constitutional Court will use "constitutional practice in the democratic regime of government with the King as Head of State" (article 207). According to constitution-drafters, the objective of such provision is to give the Constitutional Court the means to solve institutional deadlock<sup>529</sup>. Meanwhile, article 7 was suppressed<sup>530</sup>. The Constitutional Court is now the only supreme interpreter of "constitutional practice in the democratic regime of government with the King as Head of State".

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In conclusion, from 1997 to 2016, there were many attempts by constitution-drafters to give the Constitutional Court exceptional powers, such as the power to guide the appointment of a prime minister in times of crisis, following "constitutional practice in the democratic regime of government with the King as Head of State".

When the country meets with crises and the constitutional organs as "efficient parts" [political institutions with "efficient" power as opposed to a-political institutions with symbolic power] cannot resolve the problems, the people will look for guidance from the King's Royal Remarks. Once the King speaks, all sides wholeheartedly act accordingly, thereby miraculously calming down heated political problems, as evident in the cases on 14 October 1973, the Black May incident in 1992 and the Royal Remarks of 25 April 2006. Consequently, the Thai monarchy has attained a social status of "Supreme Arbitrator and Conciliator of the Nation" a status which Heads of State in the presidential system can hardly achieve because leaders in such a system are politicians and have political partisanship. Thai people and political organs

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<sup>529</sup> See Constitution-drafting committee, ສູນພັດທະນາຄາດັບທີ່ ລ່າງສູງຮຽນນູ່ມີອັດຕິນ [Summary of core principles, First Constitutional Draft], January 2016, p. 20

<sup>530</sup> For an account in English, see *The Nation*, "Drafters cut Article 7, give crisis powers to top court", 12 January 2017, <http://www.nationmultimedia.com/politics/Drafters-cut-Article-7-give-crisis-powers-to-top-c-30276664.html>

wholeheartedly follow Royal advice of His Majesty the King because He is nonpartisan, stands by the interests of the country and the people, and provides advice strictly and correctly in compliance with the Constitution and the law<sup>531</sup>.

This view of royal crisis powers undoubtedly imprinted constitution-making in Thailand as its author, Bowornsak Uwanno, is the main architect of at least three of the five constitutional texts studied in this article<sup>532</sup>. As the new Constitutional Court is empowered to take on the role of ultimate crisis-solver that once was exerted by the King, it can prove a great tool to ensure preservation of a *status quo* founded on the monarchy as personified by King Bhumibol in a future without King Bhumibol.

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<sup>531</sup> *Ibid.*

<sup>532</sup> 1997 Constitution (as Secretary-General) and 2015 drafts (as President).